LURA D. GRIMSLEY and HARRY A. [illegible],

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Answer to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

RAY L. CHESEBRO,
DONALD M. REDWINE,
JOHN L. BLAND,
400 City Hall, Los Angeles 12,
Attorneys for Respondent, The People of the State of California.

Parker & Company, Law Printers, Los Angeles. Phone TU. 5956.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 260

LURA D. GLASSEY and HENRY L. BROENING,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Answer to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Statement of the Case.

The petitioners were charged with violation of subsection (H) of a Los Angeles ordinance (Section 47.50, Los Angeles Municipal Code), which declares it to be unlawful for any person to *operate, manage or conduct* a camp or other place of resort wherein "three or more *persons not all of the same sex* are permitted or allowed to commingle in the nude; or wherein *persons are permitted or allowed to view persons of the opposite sex in the nude.*" (Emphasis ours.)

The subsection does not prohibit persons who are cultists of nudism from commingling; neither does it prohibit members of the same family from associating together in the nude. Nor yet does it make it unlawful to operate a camp where persons, whether members of a cult or not, commingle or expose themselves provided the sexes be segregated.

The subsection involved is a penal provision, separate and apart from the remainder of the section which provides for the licensing of nudist camps. Subsection (H) applies to persons conducting a licensed camp to the same extent as it applies to persons conducting an unlicensed camp.

It does not appear by the record that any of the persons who attended the camp conducted by petitioners were members of the nudist cult or believed in any of the tenets of nudism. Neither does it appear that the petitioners, defendants and appellants below, ever at any time urged that the ordinance interfered with any social, religious or political belief entertained by them. The matter now urged by petitioners came before the Appellate Court (and before such court only) solely by reason of the argument of *amicus curiae.* [R. 60.]

The statement in the petition to this court (Petition page 2) that the issue was decided adversely to petitioners "over their argument," lacks much of being entirely correct. The fact that the petitioners were operating such a camp as is proscribed by the ordinance is concluded by the decision of the state court.

Questions of Law Involved.

The questions of law involved are:

(1) Do the provisions of the First Amendment, as incorporated in the Fourteenth Amendment, prohibit a state from enacting and enforcing under the police power a law aimed at preventing conduct having a reasonable tendency to induce immorality?

(2) Assuming that the First Amendment protects cultisms other than religious and political cults, does the First Amendment operate to prevent the state from enacting laws applicable to those who engage in conducting camps where persons devoted to cults, other than religious or political, congregate?

Before the questions of law above mentioned are answered, two other questions must be considered:

(a) May one who has not raised in the state courts his defense of the alleged infringement of his rights under the First Amendment be heard to urge that point in this court?

(b) May one who has not at any time during the course of proceedings in the state courts urged his belief in the cult of nudism, urge the invalidity of a law regulating nudity, assuming for the purpose of argument only that a person believing in the tenets of such cult would have a right to a hearing here?

Summary of the Argument.

I.

THE RECORD DOES NOT PRESENT A CASE WHICH, UNDER THE PRACTICE OF THE COURT, REQUIRES A DECISION UPON THE FEDERAL QUESTION.

II.

THE SECTION INVOLVED DOES NOT INTERFERE WITH THE PRACTICE OF NUDISM.

III.

THE PROHIBITION OF ACTS WHICH ARE OFFENSIVE TO MORAL CONCEPTS IS WITHIN THE POLICE POWER OF THE STATE, AND SUCH PROHIBITION DOES NOT OFFEND AMENDMENTS ONE OR FOURTEEN OF THE FEDERAL CONSTITUTION.

IV.

RELATION OF THE "CLEAR AND PRESENT DANGER DOCTRINE" TO THE ORDINANCE DISCUSSED.

V.

CONCLUSION.

ARGUMENT.

I.

The Record Does Not Present a Case Which, Under the Practice of the Court, Requires a Decision Upon the Federal Question.

This court in *The Rescue Army v. The Municipal Court of the City of Los Angeles,* .... U. S. ...., 91 L. Ed. (Adv. Sheets) 1221, has again emphasized the fact that, although jurisdiction be shown, it is the policy of the court to refrain from deciding a federal question unless it appears from examination of the record that the question was squarely presented.

If, for the purpose of argument only, it be assumed that all social ideologies come within the protection of the First Amendment, it nowhere appears that the petitioners, or either of them, are members of any cult subscribing to the principles or beliefs set out in the registration form (Petition, Appendix B., Appendix p. 3). They were found guilty of running a camp such as is prohibited by the ordinance. Many persons who are not, and never have been, consumptives, conduct resorts for persons affected with tuberculosis.

As shown by the certificate of the Appellate Court [R. 60] the appellants did not urge before that court that enforcement of the ordinance trenched upon any religious, political or social belief. It does not appear in the record that any such claim was made in the trial court. The first and only claim to that effect was made

by *amicus curiae,* now counsel for petitioners, at the time of argument in the Appellate Court. True, the Appellate Court does certify that the federal question was considered by the court. We have never been under the impression that, even though a court saw fit to consider a question raised only by friends of the court, such decision was one which gave rise to a hearing before a higher court. In fact, we have been so naive as to think the function of *amicus curiae* was to support some contention of one party or the other to an action, and that it was not the duty or the privilege of friends of the court to introduce new questions, in the substance of which neither party to the case was interested.

It is now well settled that no person may require a court to decide the validity of a law unless it appears that the law, if valid, infringes in some way upon his liberties.

Hanneford v. Silas Mason Co., 300 U. S. 577, 583;

Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 558;

Massachusetts v. Mellon, 262 U. S. 447, 488;

Utah Power & Light Co. v. Pfost, 286 U. S. 165, 186.

In view of the fact that petitioners have not claimed in any state court that the ordinance under which they were prosecuted infringed upon their right to practice their social beliefs, this case appears to come well within the doctrine of the *Rescue Army* case, *supra.*

When and if there comes before this court a case in which a law prohibits the practice of nudism by a believer in such social ideology, ample opportunity to examine into the relation of such concept of social behavior to the police power of the state will exist. Certainly one who is charged only with the act of running a camp where commingling of the sexes in the nude was permitted, cannot expect this court to determine whether the rights of believers in nudism are infringed by the ordinance.

Furthermore, no decision upon the merits of nudism and its relation to the First and Fourteenth Amendments is called for when, under the ordinance involved, practice of the tenets of nudism is not prohibited to the devotees of such cult, except to the extent that the ordinance requires that those who practice such tenets in camps must forego the exposure of themselves in the nude to persons of the opposite sex.

II.

The Section Involved Does Not Interfere With the Practice of Nudism.

Although we feel that application of the principle enunciated in the *Rescue Army* case will result in denial of *certiorari*, we nevertheless shall discuss the other questions explicit in the record for such assistance as such discussion may render to the court.

No rule is better established than the rule that this court accepts the construction placed upon a state law by the courts of the state. The state court has held that subsection (H) of Section 47.50, Los Angeles Municipal Code, is severable from the remainder of the section which subjects nudist camps to regulation [R. 51.] However, it is proper to examine the remainder of the section to determine whether the City has attempted to prohibit that which petitioners designate as a "social belief." Such examination discloses not only no attempt to prohibit the practice of such social concept but discloses an intent to protect the exercise of such beliefs by licensing resorts in which such beliefs may be practiced. The ordinance not only provides regulations which tend to discourage and prohibit immoral practices, but requires that such places be so conducted that they are not offensive to the social standards of the vicinity.

There may come a time in the history of this nation when the social standards revert back to the time of Adam and Eve before their fall, but until such time comes it will be within the power of the legislature to require that persons of the opposite sex, when in the presence of each other, be clothed in at least a fig leaf or its modern equivalent, or, as in the case at bar, pro-

hibit the operation of camps where persons of the opposite sex may resort together in the nude.

We digress to point out that petitioners wholly misinterpret the subsection when, at page 19 of their petition, they insist that if a husband and wife appear unclothed in the presence of their two months old child the husband would be guilty of violating the subsection involved. The subsection does not purport to cover actions in the home by any person, whether or not he be a convert to nudism. The ordinance is limited to camps, colonies and resorts, and subsection (H) punishes only those operating such places under conditions proscribed. The words used do not connote residences of members of the same family. Assuming, for the purpose of argument only, the correctness of petitioners' construction, and further assuming that as to persons in such family relation the ordinance would be invalid, it does not follow that the ordinance is invalid as applied to these petitioners, who make no claim to being members of the same family.

Although a law may be so broad as to embrace within its field of prohibition acts not within the police power to prohibit, such fact does not render the law invalid as to those properly within its field of effectiveness.

Smiley v. Kansas, 196 U. S. 447, 457.

It is a familiar rule that a thing may be within the letter of the law and yet not within the statute because not within its spirit, nor within the intention of its lawmakers.

Church of Holy Trinity v. U. S., 143 U. S. 457.

General terms will be so construed as to avoid injustice, oppression or absurd consequences.

U. S. v. Kirby, 74 U. S. (7 Wall.) 482.

In *Lake Shore & M. S. R. Co. v. Ohio,* 173 U. S. 285, this court pointed out that it is always possible for an ingenious mind to suggest extreme cases under which the application of any particular judicial decision could be held to be inconsistent with the Constitution, and said that when such situations presented themselves it could be determined whether they are controlled by the decision previously rendered.

When and if the State of California attempts to enforce the ordinance involved in this action against a father who appears nude, or who, with his wife, appears nude in the presence of his two months old child, it will be time for this court to consider whether the ordinance unduly interferes with the homelife of our citizens. And when and if the City of Los Angeles adopts an ordinance, the result of the enforcement of which will deprive some believer in nudism as a social concept from practicing the tenets of his belief., it may become proper for this court to give ear to the plaint of such person.

So long as the ordinance before this court does not prohibit the practice of nudism, certainly persons who are engaged in the operation of camps for the benefit of such cultists, at a charge of so much per day or week [R. 33], cannot raise in this court the question of validity of the ordinance as it affects persons who are devotees of the cult of nudism.

III.

The Prohibition of Acts Which Are Offensive to Moral Concepts Is Within the Police Power of the State, and Such Prohibition Does Not Offend Amendments One or Fourteen of the Federal Constitution.

The position of petitioners appears to be that a social concept, whatever its nature, comes within the protection of the First Amendment, and the indulgence in or practice of such social concept is entitled to the same protection afforded by such Amendment to the practice of religion. We do not understand petitioners to urge that nudism is practiced as a means of worship of some Supreme Being. To say that their theory is at least novel is an understatement.

It has been often said that for the purpose of determining the meaning and application of a statute the court would attempt to ascertain what the legislature intended to accomplish by a given statute. Likewise it is proper to consider what our forebears intended to protect by the First Amendment. In the instant case, inasmuch as no question of free speech is involved, we may confine our inquiries to what object was sought to be accomplished by the provision for freedom of worship.

However limited may be the right of courts to take judicial notice of facts, certainly this court can take judicial notice of the fact that at the time of the colonization of America there was an established English church and that certain colonies were established as a refuge from conformance to such State religion. Likewise the court can take notice of the fact that nations other than England had State religions and that persons not con-

forming to such religions were persecuted. Many of the original colonists came to the new continent to enjoy "religious freedom" but, sad to say, too often their idea was not religious freedom but freedom to worship in their own manner and to compel others to conform to their form of worship. This backdrop reflects the light upon the First Amendment so that we can see that the citizens of the new nation intended that there could never be a State religion which would prevent them from worshipping God in such manner as they saw fit. It was never intended that the First Amendment protect the practice of social ideologies which offended public morals or decency. However strong our imagination may be, we find it impossible to imagine that our forefathers, who would have been shocked at the sight of a woman in a modern evening gown, to say nothing of one on the streets in bra and shorts or on the beach in a modern bathing suit, ever intended the First Amendment to be used as a shield behind which to carry on nudism.

This court has held that laws which prohibited plurality of wives were valid, even as to those who practiced such custom as a religious duty and belief.

Reynolds v. U. S., 98 U. S. 145;
Davis v. Beason, 133 U. S. 333;
Church of Jesus Christ of Latter Day Saints v. U. S., 245 U. S. 366.

Certainly the power to enact prohibitive measures aimed at protecting the public morals is no less with respect to social ideologies than it is with respect to religion.

That the protection of public morals is a function within the police power of the state is so well settled as to need no citation of authorities in support thereof.

IV.

Relation of the "Clear and Present Danger Doctrine" to the Ordinance Discussed.

Petitioners urge that the practice of nudism itself, without more, does not constitute a clear and present danger to society (Petition p. 12). We have found no cases in which courts have attempted to apply such doctrine to ordinances aimed at the protection of public morals and decency.

In view of the fact that during argument of the *Rescue Army* and *Gospel Army* cases a member of this court indicated that it could not be seen wherein the clear and present danger doctrine was applicable to these cases, we are inclined to think that such doctrine has no application to the instant case. For that reason it is with some considerable hesitancy that we risk trespassing upon the time of the court by discussing the point. However, because of prevalent uncertainty in the minds of the judiciary as well as in the minds of the legal fraternity concerning the scope of the doctrine, we feel impelled to discuss the subject briefly.

The question which arises is: What constitutes a clear and present danger?

Using a physical illustration, we will suppose that a number of children were playing on the street and a dog affected with rabies appeared on the street two blocks away. Was there a clear and present danger that some of the children might be attacked by the

dog? Or would the possibility that some alert citizen might kill the dog before it reached the children defeat the clear and present danger doctrine until the dog got within a few feet of them? Or would the fortuitous possibility that such dog might turn aside or pass the children in its path, thus doing them no harm, impel the conclusion that there was no clear and present danger until and unless the dog was in the act of biting a person?

Applying the same reasoning to freedom of speech and press as it may apply to national safety, and considering the fact that the writer of this brief several years ago sat at the counsel table when opposing counsel, representing a certain alleged political party, which we here leave unnamed, said in argument to the court that such political party intended to overthrow the government of the United States, peacefully if possible, by force of arms if necessary, we wonder whether the doctrine ceases to be operative when the legislature, from facts before it, has reasonable grounds to believe that, unless certain action is taken, jeopardy to the peace of the state will result, or must it wait to act until violence occurs and the streets run red with blood?

With respect to ordinances aimed at protection of public morals, and in particular the ordinance under discussion, if the doctrine applies, does it mean that, when it appears to the legislature that continuance of the operation of camps where persons of the opposite sex associate in the nude will undermine public morals, the legislature may prohibit the operation of such camps, or does it mean

that the hand of the legislature is stayed until such time as, because of the operation of such camps, fornication and licentiousness runs riot in the vicinity?

Although Mr. Justice Frankfurter in a concurring opinion in *Pennekamp v. Florida,* 328 U. S. 331, made what appears to us to be a clear and realistic approach to the proper application of the phrase "clear and present danger," such construction of the phrase has as yet failed to receive the blessing of the court.

Each of the words "clear" and "present" have various meanings which render any definite conclusion as to the meaning of the phrase "clear and present danger" impossible in the absence of some more definite judicial expression concerning the sense in which the term is used. Suffice it to say that the founders of this nation, in our opinion, never intended the First Amendment to become the sarcophagus of common decency, or an impregnable wall which would prohibit a legislature from enacting legislation in protection of the public morals, unless the inescapable result of failure to enact such law would result in the total destruction of the social system.

Neither does the clear and present danger doctrine require the legislature to stay its hand until conditions become such that, in the absence of legislation, wholesale and uncontrolled immorality is the rule rather than the exception in the various communities of the nation.

V.

Conclusion.

By reason of the fact that the record neither discloses the tenets of nudism nor discloses that the petitioners were believers in any cultism, and for the further reason that the ordinance does not prohibit the practice of nudism, but on the contrary tends to protect such practices under healthful, moral surroundings, the petition in this case should be denied.

Respectfully submitted,

RAY L. CHESEBRO,
DONALD M. REDWINE,
JOHN L. BLAND,

Attorneys for Respondent, The People of the State of California.